YALE
LAW JOURNAL

VOL. XVII JANUARY, 1908 No. 3

THE DEVELOPMENT OF THE FEDERAL POWER TO REGULATE COMMERCE.*

There are no questions before the American people to-day of greater importance than those relating to the Federal control over commerce.

That power was granted chiefly as a safeguard against commercial hostilities and reprisals between the States. It remained practically unused until comparatively recent years. It is now clearly recognized as a great affirmative and constructive power, not limited to composing differences between State laws and systems, but constitutionally capable of effective and fruitful development in a region all its own. In some respects it may be said to be the greatest power lodged in the General Government, and the possibilities of its application are co-extensive with the possibilities of the expansion of the vast subject to which it applies.

Nothing, therefore, is of more consequence in our governmental affairs than an accurate understanding of the scope of the National and State powers in respect to commerce and the activities related to commerce, for no effective regulation is possible in either sovereignty if the power of the one be usurped or obstructed by the other. This will be understood and conceded, except by those who appear to think the Federal Government can constitutionally accomplish everything that seems good for the people and are constantly raising expectations in that direction which cannot possibly be fulfilled.

Notwithstanding the complex system of polity which prevails in this country, the American people have a complete and entire system of government with all the powers necessary to deal with every sub-

*Address of Senator Philander C. Knox to the Graduating Class of the Law School of Yale University, June 24, 1907.

ject and situtation. All governmental authority is included in one or the other, or in both, of the two sovereignties which constitute the American system.

The fact that the State governments are supreme in State affairs, and the National government supreme in National affairs does not result in the deduction that there are any affairs which may escape government control.

While the constitutional powers of the Nation and the reserved powers of the States remain ever the same, the question as to when an act or transaction is exclusively a State affair, subject to State control, or a National matter subject to National control, is one of fact as well as law, and it can be readily understood that the facts differ at different periods of our development and under different circumstances relating to the subject.

That which in the earlier period of our history was a matter of State concern may become one of National concern by the establishment of commercial intercourse in respect to it with other States and foreign nations, or become a National concern because of conditions affecting the subject which call for the exercise of national power theretofore dormant. The power to regulate this intercourse or commerce between the States, the right to engage in which the Constitution did not create, but which existed at the time of its adoption, was given to the Federal Government by the Constitution.

The constitutional power of regulation having been granted to the Federal Government in respect of a subject naturally liable to development and change, it can be said its authors contemplated a corresponding enlargement; not, be it observed, in the power, but in its application to the expanding subject. When Congressional powers are applied to new conditions it is not, as it sometimes seems to be, an extension or expansion of the power, but an indication of a change in or extension or expansion of the subject upon which the power operates. Neither the power to regulate commerce nor the conception of its scope has expanded beyond its definition by the Supreme Court when first considered, nearly one hundred years ago. It was then pronounced "complete in itself, that it may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution."

"The design and object of that power (the commercial power), as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights and to prevent unjust and invidious distinctions which local jealousies or local and partial interests might be disposed to introduce and maintain."

The necessity to exercise the National power over commerce arises largely out of the failure of the States to regulate wisely great corporations created by and under the dominion of the States and engaged in interstate commerce. That failure has led to well-known abuses which affect interstate commerce, and thereby created the necessity for the exercise of Federal regulation to prevent the abuse.

The necessity for the exercise of Federal Regulation almost always springs from causes which the States could have prevented.

The National power of regulation should ordinarily be invoked only when necessity for regulation exists. Normally and honestly conducted commerce requires but little if any governmental regulation, and the failure by Congress to regulate interstate commerce is equivalent to a legislative declaration that it shall be free. Abnormal conditions in commercial intercourse caused by monopolies, preferential service, rebates and the like, destroy the normal operations of commerce and create the demand for Federal regulation to restore the rule of freedom and equality.

The pressure of the accumulated evils and abuses of many years of inadequately regulated commerce in this country culminated some few years ago in an imperative necessity for action to test the adequacy of existing laws to meet the situation, and the enactment of such additional ones as should prove to be necessary to restore and preserve freedom and equality in interstate and foreign commerce.

The combinations to control the production, distribution and sale of commodities which were to be subjects of interstate commerce; the combinations between and the mergers of interstate railroads, designed to bring under one control the transportation business of large areas of the country; the unjust discriminations for the benefit of favored shippers and localities, both in the carrying service and the rates charged therefor; the secrecy sometimes surrounding the operations of corporations rendering service to the public had utterly destroyed in many localities the ability of other persons and concerns to engage in commercial competition with the favored ones who enjoyed such unfair and illegal advantages.

A brief statement of how this situation was dealt with by the National Government, the theory upon which the Government proceeded, and some observations upon certain dangerous misconceptions as to the scope of the powers that have been successfully invoked to correct the evils I have named, will not, I hope, be uninteresting nor uninstructive.

The scope of existing laws was tested through a series of suits. These suits had for their main purpose to determine the effectiveness of existing statutes to reach new types of combination which had for

their object to restrain the free-play of the law of competition, and new and subtle discriminatory devices which had sprung from fertile and experienced minds instructed in the interpretations the courts had put upon the existing laws.

The purposes for which this litigation was undertaken were all accomplished. The completeness of the Federal power over commerce was reaffirmed and declared to extend, among other things, to the holding company.

This device which had been successfully employed to establish under one control the leading productive industries of the country was declared illegal when utilized to absorb competing systems of interstate railroads ,and thereby we escaped a danger to our commerce, our Government and our very liberties, the magnitude of which can scarcely be grasped.

It was likewise judicially determined, that a combination between a railroad company and a shipper, to grant the latter an unlawful rebate which results in the establishing of a monopoly, is a violation of the Sherman Act, and that a court of equity might restrain the guilty parties at the suit of the Attorney-General of the United States, as well under that Act, as under the general jurisdiction in equity. Of almost equal importance was the decision that the operations of a monopolistic combination within a State may be so connected with those between the States as to bring the whole under the regulative power of Congress.

Notwithstanding the success which attended these suits, there was developed a number of serious defects and omissions in National legislation necessary to be remedied, if the avenues of commerce were to be kept open to all upon the same terms, and if a speedy and workable remedy for violations of the law was to be placed in the hands of the Government itself to restore the rule of freedom and equality in interstate and foreign commerce.

The legislation proposed to the Fifty-seventh Congress as necessary to accomplish the restoration of the normal commercial rule, all of which was promptly enacted, was:

1st. That in respect of railroad rebates, the omission in the act to regulate commerce to punish the beneficiary should be supplied by imposing a penalty, not only upon the carrier who gave, but upon the shipper who received, such rebates, and that the power of the equity courts to restrain such practices at the suit of the United States should be made certain by statute.

2d. That it should be made unlawful to transport traffic by carriers subject to the act to regulate commerce at any rate less than

such carriers' published rate, and that all who participated in the violation of such law should be punished.

3d. That a comprehensive plan should be framed to enable the Government to get at all the facts bearing upon the organization and practices of concerns engaged in interstate and foreign commerce essential to a full understanding thereof.

4th. Another step in legislation which was earnestly recommended was an act to speed the final decision of cases under the interstate commerce and anti-trust law.

These laws, enacted during the short session of the Fifty-seventh Congress, were followed by the railroad rate law of the Fifty-ninth Congress, the principal feature of which is the grant of power to the Interstate Commerce Commission to fix a reasonable rate for the carriage of goods and persons.

These laws were designed to secure equality in transportation service and equality, stability and reasonableness in transportation charges. They provide a swift remedy at the suit of the Government in its own courts of equity, thereby relieving the individual sufferer from the expense and delay incident to a private suit.

All these laws have been declared constitutional, except the railroad rate act, and as to that act, not yet passed upon by the courts, it is believed by the great weight of legal opinion to be constitutional in respect to the power to fix reasonable rates and practices.

The public satisfaction resulting from the enactment and the enforcement of these statutes regulating commerce has induced some persons to contend that the Congressional power to regulate commerce is a panacea for many other public evils, and it is proposed to utilize that power to accomplish ends not within the national jurisdiction, and having no relation to the subject of the power.

"The power to regulate is the power to prescribe the rule by which commerce is to be governed." These are the words of Chief Justice Marshall in *Gibbons v. Ogden.*

This power of prescribing the rule by which commerce is to be conducted extends to commerce itself and to the instrumentalities of commerce.

By commerce itself, I mean the activities and intercourse which constitute the commercial relation. By the instrumentalities of commerce, I mean the animate and inanimate means used to maintain and carry on commercial intercourse.

As to these activities and intercourse which constitute commerce, Congress has from time to time prescribed certain rules; such for instance as the rule that commerce shall be free from

monopoly and restraint effected by combinations, and that the general rule of competition shall have free-play.

As to the animate and inanimate means, or instrumentalities by which commerce is conducted, Congress has likewise prescribed various rules; such as contained in the Railroad Safety Appliance Act, and the act prescribing the hours of labor of employees upon railroads engaged in interstate commerce.

Over this subject of commerce among the States and with foreign nations, and its instrumentalities, the power of Congress is plenary. It may be exercised in the most general or minute way. For this purpose, Congress possesses all powers which existed in the States before the adoption of the National Constitution, and its power when the subject is national is or may be made exclusive. The constitutions, laws, corporations and citizens of the States are subject to this paramount authority. Congress can regulate anything, everything, any and every person, natural or artificial, in the sense that it can prohibit or prevent any use or act that will interfere with congressional control over interstate commerce, or that will injuriously affect such commerce. Congress may likewise prevent the arteries of interstate commerce from being employed as conduits for articles hurtful to the public health, safety or morals, and may remove obstructions from the highways of commerce whether they be physical or economic, whether they may be sand bars, mobs or monopolies.

The power of Congress may be exercised by prohibition and by prescription.

Congress has prohibited combinations in restraint of interstate and foreign trade and has prohibited the carriage of diseased cattle, explosives and lottery tickets, and Congress has prescribed that certain safety appliances shall be used upon railroads doing an interstate business. The one class of laws is designed to keep the channels of commerce free and unpolluted; the other is designed to secure the safety of the employees and patrons of the carriers.

I cite these acts because their constitutionality has been sustained, because they obviously bear directly upon commerce and for that reason will serve to make clear the distinction between the well established rule to be deduced from the decided cases and the extension of the rule involved in certain pending legislative propositions of Federal control, to which I shall now direct your attention.

The existing rule, as it has been judicially determined, may be restated in these words: Congress has the power to regulate interstate commerce, which includes the power to regulate the means or instrumentalities by which commerce is conducted.

The new proposition is this: Congress has the power to regulate commerce including its instrumentalities, *and likewise power* to regulate the persons by whom articles of commerce are produced in respect to matters not connected with commerce.

This addition to the rule finds expression in the suggestion to prohibit the interstate transportation of articles of value which are in themselves innocuous and which are lawfully made or produced in a State for reasons not affecting interstate commerce.

Let us now consider whether the regulation of the business of producting articles which may in whole or in part go into interstate commerce for reasons not affecting such commerce, is a legitimate regulation of commerce. In other words, is the mere production of goods commerce? If it is not, then can Congress regulate such production within a State under the constitutional power to regulate interstate commerce?

It would be difficult to overstate the importance and seriousness of the question thus presented, as upon its ultimate authoritative determination depends, it may be, the autonomy of the States in substantially all matters of internal police.

It is scarcely worth while to discuss the proposition that production is not commerce.

Mr. Justice Lamar remarked in *Kidd v. Pearson,* 128 U. S.:

> No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transaction in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management.

In *Veazie v. Moore,* 14 How., 574, the Court said:

> The phrase "to regulate commerce" can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and

laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase *foreign commerce,* or fairly implied in any investiture of the power to regulate such commerce. A pretension as far reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the colliers and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned.

But it is claimed that as the power to regulate commerce is absolute, complete and mainly exclusive in Congress, the right to forbid the shipment in interstate trade of any kind of goods, for any reason, comes within that power. That is to say, under the guise of a commercial regulation, not necessary for the promotion or protection of commerce, a producing regulation, which Congress could not have enacted, may be enforced; or, in other words, Congress can deny a person the right to engage in interstate commerce for doing that which Congress cannot prohibit him from doing. But, as we have seen, Congress cannot regulate production, and Chief Justice Marshall said in *McCulloch v. Maryland:*

> Should Congress under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

In my judgment, the power to regulate commerce between the States does not carry with it the power to prohibit commerce, unless the prohibition has for its purpose the facilitation, safety or protection of commercial intercourse, or the accomplishment of some other National purpose.

The power to regulate interstate commerce does not extend to the laying of an arbitrary embargo upon the lawfully produced, harmless products of a State, nor to the right to defeat the policy of a State as to its own internal affairs.

I concede that the National power to regulate interstate commerce carries with it the right to prohibit commerce in order to secure equality of commercial right, or to prevent restraint of or interference with commerce, but not to prohibit the shipment from the State of the innocuous products of producers who are pursuing a course sanctioned by the laws of the State and in no wise in itself

interfering with interstate commerce. If prohibition of interstate trade is within the arbitrary power of Congress, it might be exercised so as to exclude the products of particular states or sections of the country. Congress then might prohibit the shipment of cotton or wheat to promote the interests of wool or corn.

There is no authority for any such proposition. The power of prohibition has never been sustained except as against articles noxious or dangerous in themselves. It is not possible to find even a suggestion that in respect to natural products which are prime necessities, Congress can prohibit commerce in them between the States in order to enforce its conception of what would be a wise police regulation of a State.

In the case of *Champion v. Ames,* 188 U. S., 321, it was held that lottery tickets are subjects of traffic and their carriage by independent carriers from one State to another is interstate commerce, which Congress may prohibit under its power to regulate commerce among the several States, but this was specifically placed upon the character of the business. The court said, through Mr. Justice Harlan, "It is a kind of traffic which no one can be entitled to pursue as of right."

The Court also said:

> . . . The power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument.

The right of each State to regulate its domestic affairs is "secured and protected" by the Tenth Amendment reserving to the States respectively, or to the people, the powers not delegated to the United States.

In *Gibbons v. Ogden,* 9 Wheat. 111, the Court said with regard to the right of intercourse between State and State, that that right was derived not from the Constitution, but from "those laws whose authority is acknowledged by civilized man throughout the world." Under the Articles of Confederation the States might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves to the general government it was undoubtedly in order to form a more perfect union by freeing such commerce from state discrimination and not to transfer the power of restriction.

In *Dooly v. United States,* 183 U. S. 171, the four dissenting Justices correctly said:

> But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument.

The sum of the matter then is this: For the purpose of promoting and protecting commerce, Congress may close its channels to those who are injuriously affecting it, but for the purpose of enforcing its views of public policy in respect to matters not within the jurisdiction of Congress, it has no such power.

Congress may employ such means as it chooses to accomplish that which is within its power. But the end to be accomplished must be within the scope of its constitutional powers. The legislative discretion extends to the means and not to the ends to be accomplished by use of the means.

In a word, I do not take issue with the general proposition that Congress may prohibit transportation, but I say the prohibition must have for its real object the regulation of interstate commerce and not something *dehors* the Federal power.

In a recent case, the Supreme Court of the United States, through the Chief Justice, speaking of the power and sovereignty of a State, uses this language:

> It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its domain," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

That the Congress of the United States has no general legislative powers, but only such as are granted to it by the Constitution is not an old-fashioned and exploded notion.

It has been reaffirmed with emphasis by the Supreme Court within the last sixty days in a great opinion by Mr. Justice Brewer in the case of *Colorado v. Kansas.*

The learned Justice said: "That this is such a government" (one of delegated powers) "clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act."

We cannot make progress in developing a body of substantive remedial law without an accurate appreciation of the restrictions upon both the State and Federal powers.

Like the Girondists in the French Revolution, American lawyers must submit to be condemned by the Bourbons as radicals if they stand for rational and constitutional legislation to meet new conditions and to correct the evils in the old conditions, and to be guillotined by the Reds as obstructionists if they fail to endorse the popular vagaries of the political ephemera who swarm about every great movement of reform, unappreciative of its origin, its tendency, and its purpose. Such is the fate of the profession that studies, loves and defends the institutions of civilized government and has ever been their most powerful constructive and conserving force.

The preservation of our Constitution is not committed to the Federal judiciary alone. It is the oath-bound obligation of every legislative, judicial and executive officer both of the States and Nation, and is the highest duty of private citizenship. The Constitution is not to perish at the hands of the impassioned phrase-maker, and its defenders should not be deterred by mistaken or prejudiced clamor from performing their obligation to preserve and defend it.

The Constitution was founded upon the sacrifice of the lives and fortunes of our ancestors; it is the solemnly expressed will of the people; it has been preserved by the people through the most gigantic and tragic war of modern times, and it must endure as written and expounded until altered by the people by the means they have prescribed.

The power of the Federal government cannot be increased except by new grants of power through amendment of the Constitution. The efficiency, however, of the Federal government will progressively increase through the application of existing Federal power to the growing complexities of social and commercial conditions.

What changes in these conditions may be in store for us no man can foretell. What social readjustments may follow the application of the Federal commercial power to such changes is likewise unknown. The power is a fixed and definite factor; no one has pretended to define the boundaries of the subject upon which it operates. The distinguished present Solicitor-General of the United States, an honored son of Yale, Mr. Henry M. Hoyt, in a recent argument in the Supreme Court, aptly said: "The word commerce is not restricted to trade and traffic, or navigation or transportation. No one can now say definitely what movements and interactions across state lines may not be embraced within its meaning."

Human government is a human necessity. It is all the stronger and more effective in times of dire need for not having been experimented with and its fiber strained in times of tranquility.

The way to make real progress in needful legislation, and to permanently retain each advance, is to move wisely along legitimate lines. This is a land of law as well as of liberty, and the liberty of the law-maker is subject to restraints as well as the liberty of the individual. Congress can only do what it is possible to do under the powers delegated to it by the body politic, which is the people. To do anything more would be futile usurpation; to do any less under those powers than the best interests of the people demand should be done would be neglect of duty.

It is beside the question to urge the desirability and popularity of measures if Congress has no power to enact them. Our heartiest sympathy may be enlisted in many movements and yet our judgment may be compelled to reject the means proposed for their accomplishment. I remember and am impressed by the words of President Roosevelt in his first message to Congress, that "The men who demand the impossible or the undesirable serve as the allies of the forces with which they are nominally at war, for they hamper those who would endeavor to find out in rational fashion what the wrongs really are and to what extent and in what manner it is practicable to apply remedies."

The last words of Washington and the first words of Lincoln contained a solemn admonition to us on the necessity of preserving our dual government intact.

In his farewell address to the American people, Washington said:

> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.

And in his first message to the American Congress, Lincoln said:

> To maintain inviolate the rights of the States to order and control under the Constitution their own affairs by their own judgment exclusively, is essential for the preservation of that balance of power on which our institutions rest.

And, finally, Chief Justice Marshall, the great expounder of the Constitution, said, in *Gibbons v. Ogden:*

> The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. *Philander C. Knox.*